No. _____

In The Supreme Court of the United States

COLLINS HOLDING CORPORATION, *et al.*,

Petitioners.

v.

SOUTHTRUST BANK,

Respondent,

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

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QUESTION PRESENTED

Whether a Federal District Court, sitting in the State of Alabama applying Alabama substantive law, can impose Georgia substantive law to add a provision to a settlement negotiated at a mediation session held physically in Georgia?

LIST OF PARTIES TO THE PROCEEDING

The parties to the proceeding are listed below:

Plaintiff:

1. SouthTrust Bank

Defendants:

1. Collins Holding Corporation, which is the successor in interest to Collins Music Co., Inc. a/k/a Collins Music Company, Inc.

2. 501(c)(3) Charity Consultants, Inc.

3. Collins Coin, Inc.

4. Collins Games of Georgia, Inc.

5. The following named defendants, Electronic Games of Alabama, Inc. f/k/a Collins Games of Alabama, Inc., Collins Games of Colorado, Inc., Collins Games of Florida, Inc., Collins Games of Indiana, Inc., Collins Games of Kentucky, Inc., Collins Games of Louisiana, Inc., Collins Games of Minnesota, Inc., Collins Games of Mississippi, Inc., Collins Games of Missouri, Inc., Collins Games of South Dakota, Inc., Collins Games of Tennessee, Inc., Collins Games of Texas, Inc., Collins Games of West Virginia, Inc., and Collins Games of Wisconsin, Inc., were merged into Collins Holding Corporation on or about October 5, 2001.

6. Named defendant Carolina Amusement Services, Inc. was merged into Carolina Redemption, Inc. on or about October 5, 2001.

7. Named defendant Davis Music and Amusement Services, Inc. was terminated as a corporate entity on or about July 31, 2002.

Pursuant to Rule 29.6 of the Rules of this Court, there are no parent corporations of the remaining named defendants and no publicly owned company owns ten percent or more of the remaining named defendants.

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No. 05-

COLLINS HOLDING CORPORATION, et al.,

Petitioners.

v.

SOUTHTRUST BANK,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

Petitioner Collins Holding Corporation and the other Collins entity defendants named in this action ("Collins Holding") respectfully request that this Court grant its Petition for a Writ of Certiorari to review the decision and judgment of the United States Court of Appeals for the Eleventh Circuit issued in favor of SouthTrust Bank ("SouthTrust"). The decision below allows a federal district court sitting in the State of Alabama applying Alabama substantive law to impose Georgia substantive law to add a material provision to a settlement negotiated at a mediation solely on the basis that the mediation session was held physically in Georgia. This violates the fundamental

requirement that a federal district court apply the substantive law of the state in which it sits.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit filed on May 11, 2005 is unpublished and appears in the Appendix of this Petition ("Pet. App.") at 1a-5a.

The Order of the United States District Court for the Northern District of Alabama, Southern Division in SouthTrust Bank v. Collins Holding Corporation, et al., Case No. CV-04-P-0354-S, filed October 22, 2004, granting SouthTrust's Motion for Order to Enforce Settlement Agreement and denying Collins Holding's Motion for Enforcement of Settlement Agreement and Amended Motion for Enforcement of Settlement Agreement is unpublished and appears at Pet. App. 6a-8a. The District Court's Findings of Fact and Conclusions of Law filed contemporaneously with its Order on October 22, 2004 are unpublished and appear at Pet. App. 9a-42a.

The Order of the Eleventh Circuit filed on July 14, 2005 denying Collins Holding's Petition for Rehearing *En Banc* is unpublished and appears at Pet. App. 43a-44a.

JURISDICTION

The United States Court of Appeals for the Eleventh Circuit entered its opinion on May 11, 2005. The Eleventh Circuit entered its Order denying Collins Holding's Petition for Rehearing *En Banc* on July 14, 2005. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

28 U.S.C. § 1652 **State laws as rules of decision**

"The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

STATEMENT OF THE CASE

I. History of the Pertinent Facts Leading to the Commencement of the Lawsuit Filed by SouthTrust.

SouthTrust is an Alabama banking corporation with its principal place of business in Birmingham, Alabama. Fred J. Collins (hereinafter referred to as "Fred Collins") is the chief executive officer, president and controlling shareholder of the Collins Holding defendants referred to herein.

Beginning in 1996 SouthTrust loaned money, through a series of loans, to Collins Holding. These loans were to the Collins Holding corporations and Fred Collins never gave any type of personal guarantee for the corporate debt. These loans were evidenced by loan agreements, promissory notes, security agreements, financial statements, extension agreements and other documents collectively referred to as the "Loan Documents." Through these Loan Documents, SouthTrust maintained a security interest in certain assets of Collins Holding.

The parties also stipulated in the Loan Documents that:

> [t]he Loan Documents uniformly provided that any dispute or legal action regarding the loans and transactions between the bank and Defendants was to be governed by Alabama law and to be heard by a court of competent jurisdiction in Alabama.

See Pet. App. at 12a, ¶ 5.

In fact, within the Loan Documents alone are no less than 25 choice of law provisions, all stipulating that the documents are to be construed according to the laws of Alabama.

The Collins Holding companies began struggling and in October 2001, Collins Holding was in default of its obligations to SouthTrust. SouthTrust agreed on two occasions to extend the time period in which Collins Holding was to make repayment. Over the years, SouthTrust had loaned Collins Holding approximately $33 million in principal, which Collins Holding had paid down to less than $13 million at the time of its financial difficulties. Throughout the period of the Collins Holding companies' struggles, Fred Collins personally infused $2-3 million of his own money to try to keep the companies afloat.

Around the same time that the Collins Holding companies began facing financial difficulties, Collins Holding obtained a judgment against International Games Technology ("IGT"), a Nevada based company, in the amount of $15 million (the "IGT Judgment"). IGT, a substantial Nevada company, pursued numerous appeals through the South Carolina appellate courts and to this Court. IGT lost at each stage, and despite this fact, IGT had not paid the IGT Judgment at the time SouthTrust initiated this action.

SouthTrust and Collins Holding disputed whether SouthTrust had a perfected security interest in the IGT Judgment. SouthTrust viewed this judgment as Collins Holding's only likely source of repayment of the loans. However, if SouthTrust seized the IGT Judgment in satisfaction of the loans, it would have disrupted the substantial interest that the judgment was accruing each day. The IGT Judgment was accruing post-judgment interest calculated at the rate of 14% and totaled in excess of $20 million. Fred Collins did not want to interrupt the interest this judgment was earning, which amounted to more than $5,700.00 per day.

II. The Lawsuit Commenced by SouthTrust Against Collins Holding.

On February 10, 2004, SouthTrust filed a complaint, which forms the basis for this current action, against Collins Holding in the Circuit Court of Jefferson County, Alabama and simultaneously filed a Motion for Writ of Seizure to obtain possession and control of the IGT Judgment. Collins Holding timely and properly removed the action to the United States District Court for the Northern District of Alabama, Southern Division, upon which SouthTrust renewed its Motion for Writ of Seizure. A hearing on the Motion for Writ of Seizure, which Collins Holding opposed, was set by the District Court for March 19, 2004.

During a scheduling teleconference held between the parties and the District Court, the District Court encouraged the parties to attempt to mediate the dispute prior to the set hearing date.

III. The Mediation.

SouthTrust and Collins Holding submitted their dispute to mediation (the "Mediation") on March 16, 2004 in Atlanta, Georgia before William F. Welch ("Welch"), a

mediator agreed upon by all parties. Atlanta was chosen as the location of the Mediation solely for the convenience of the parties. Ben Dishman ("Dishman"), the SouthTrust vice-president responsible for Collins Holding's account, had recently moved to Atlanta. Atlanta was also the halfway point between Greenville, South Carolina (where Fred Collins resided) and Birmingham, Alabama (where counsel for SouthTrust were located). In addition, Collins Holding's counsel at the time of the Mediation were located in Atlanta.

Appearing at the Mediation were Dishman, SouthTrust's counsel, Fred Collins, Jerry Saad (a CPA who acts as Collins Holding's financial advisor), Collins Holding's counsel, and Collins Holding's bankruptcy counsel.

The Mediation commenced around 10:30 a.m. and did not conclude until 8:00 p.m. The Mediation was divided into several segments: (1) standard introductory instructions and remarks; (2) "break-out" sessions during which the mediator conducted "shuttle diplomacy" communicating offers, counteroffers, and other information between the parties; and (3) an attorneys-only meeting between the mediator and counsel.

Late in the Mediation, Fred Collins requested a meeting between himself and Dishman, without the attorneys, to see if the impasse that had occurred during the Mediation could be overcome. Fred Collins suggested he individually might have a solution to resolve the problem. The mediator was invited to and did attend this session which lasted between twenty to forty-five minutes.

The key issue that remained unresolved was the total amount that would be paid to SouthTrust in settlement and satisfaction of Collins Holding's indebtedness, which at the

time of the Mediation totaled approximately $13,800,000.00. The entire dispute in the case had been how to resolve SouthTrust's effort to be repaid from the proceeds of the IGT Judgment. Even up until the time of the Mediation, IGT had been resisting paying and satisfying the judgment held by Collins Holding. Collins Holding was content at this point to let the IGT Judgment continue to earn substantial interest. The obligation to SouthTrust was earning interest at a lower rate than the IGT Judgment was accruing interest. Therefore, Collins Holding had an economic benefit to allow the IGT Judgment to accrue interest and remain outstanding.

During the private session held among Fred Collins, Dishman and the mediator, Fred Collins proposed a solution to the impasse in which he would agree to be personally responsible for Collins Holding's indebtedness to SouthTrust on a specific payment schedule in the amount of $13 million, which resulted in a discount of approximately $800,000.00, in exchange for an assignment to him personally of the Loan Documents. In other words, he would (1) guarantee payment of $13 million to SouthTrust, on an agreed set of dates; (2) take the responsibility and opportunity to liquidate the IGT Judgment; and (3) if he were successful in getting IGT to pay the judgment, Fred Collins personally would receive the benefit of the discounted amount which he personally guaranteed to SouthTrust. Of course, Fred Collins, in substituting himself for SouthTrust, took the risk of collecting the judgment from IGT in order to get the benefit of the discounted loans.

As a result of the proposal by Fred Collins to personally guarantee payment of $13 million in exchange for an $800,000.00 discount, it immediately would become to his advantage to pursue collection of the IGT Judgment as soon as possible to obtain the discount instead of allowing the IGT Judgment to remain uncollected and accruing

interest. The early enjoyment of the discount was now a better result for Fred Collins than the delayed accrual of the outstanding IGT Judgment.

Fred Collins and Dishman, in the presence of the mediator, agreed to this brand new and different proposal involving a personal guarantee in exchange for a discount. The three individuals returned to the presence of the full group and reported that they had reached an agreement. The attorneys were then to reduce this agreement to writing in a memorandum of understanding. At that point, the mediator excused Fred Collins from the Mediation for the long return drive to Greenville, South Carolina that night.

After Fred Collins left, counsel for SouthTrust began drafting a Memorandum of Understanding ("MOU") to capture in preliminary form the key terms to which the parties agreed until the final settlement documents could be prepared. The MOU was never signed by the parties, only by their counsel.

According to the terms of the MOU, the $13.8 million debt owed to SouthTrust by Collins Holding would be settled for $13 million with payments as follows: (1) $2 million would be paid to SouthTrust by March 31, 2004; (2) $7 million would be paid to SouthTrust by June 1, 2004; (3) $4 million would be paid to SouthTrust by March 31, 2005 (accruing interest on the date the $7 million was paid); and (4) upon payment of the $4 million, the Loan Documents would be transferred to Fred Collins. See MOU at Pet. App. 45a-47a. While the MOU did not expressly denote the personal guarantee by Fred Collins, the MOU provided that payments would be made on behalf of Collins Holding, and it is undisputed that Fred Collins personally paid the initial $2 million payment with his own personal funds and had also made arrangements to personally pay the $7 million amount. See Pet. App. at 22a, ¶ 53.

The MOU, however, also contained a "Paragraph 4" which became the crux of the controversy in this case. In Fred Collins's absence, SouthTrust's counsel and Dishman persuaded Collins Holding's counsel to add this major additional provision that would put Fred Collins in conflict with himself and potentially cause him to forfeit the very discount he had just negotiated. Paragraph 4 of the MOU provides:

> If IGT complies with the Nevada order or otherwise pays the IGT judgment before June 1, 2004, SouthTrust shall receive all outstanding principal, interest, and fees due under the Loan Documents, less any payments made by or on behalf of CHC pursuant to this settlement.

MOU at Pet. App. 46a, ¶ 4. CHC is the same as the Collins Holding companies referred to herein.

The conflict this creates for Fred Collins is in the nature of a Catch 22. Fred Collins needs to pressure or persuade IGT to voluntarily pay the judgment as soon as possible so Fred Collins can recoup what he personally pays to SouthTrust and also obtain the value of the discount. Yet, if Fred Collins does succeed in quickly having IGT pay that judgment, this new clause forfeits the very discount that he negotiated and bargained for.

When a copy of the MOU containing the terms of Paragraph 4 was forwarded to Fred Collins the very next morning on March 17, 2004, he immediately recognized that this additional clause destroyed his side of the bargain and disclaimed it. He was surprised and dismayed to see that Paragraph 4 had been included in the MOU because that term had not been part of the agreement reached between him and Dishman during their private session with the

mediator. Fred Collins had not authorized anyone, including his counsel, to include Paragraph 4 in the MOU.

Fred Collins's anger over the inclusion of Paragraph 4 of the MOU is evident after examining the nature of the agreement reached between him and Dishman. Fred Collins agreed to prompt personal payment of the $2 million with the intent that this payment, along with his promise to personally pay the remainder of the settlement payments, bought him the installment payment schedule and the discount off of the total indebtedness owed by the Collins Holding companies. Fred Collins further understood and intended that by making the $2 million payment and committing to the other payments, he was purchasing and eliminating all of SouthTrust's risk regarding the collection of the IGT Judgment and SouthTrust's risk and burden in having to pursue collection from the other assets of the Collins Holding companies.

The discounting of the amount owed on the Collins Holding companies' indebtedness was the only meaningful benefit of the bargain that Fred Collins sought and obtained in exchange for his personal commitment to pay SouthTrust. It is implausible that Fred Collins would then agree to the inclusion of Paragraph 4 of the MOU that added a contingency causing him to lose the very discount that he had negotiated so hard to obtain.

IV. The District Court's Switch from Applying Alabama Law to Applying Georgia Law To Determine Whether Collins Holding Had Agreed to the Terms of Paragraph 4.

Collins Holding did not have the ability to make the first payment of $2 million to SouthTrust under the MOU, and Fred Collins made his promised personal payment of $2 million. See Pet. App. at 22a, ¶ 53. Fred Collins then began his efforts to have IGT pay the judgment to Collins Holding

so the amount owed to SouthTrust under the settlement could be paid in full as soon as possible and Fred Collins could get the $800,000.00 discount he bargained for. SouthTrust, having accepted the $2 million, then asserted that because Collins Holding had been able to bring about the early payment of the IGT Judgment, that Collins Holding and Fred Collins should get nothing and the agreed discount should evaporate and SouthTrust get everything.

The crux of the dispute between Collins Holding and SouthTrust was over whether Paragraph 4, providing the IGT Judgment early payment contingency, was to be included as a part of the final settlement documents between the parties. As a result of this stalemate, the parties filed cross motions for enforcement of the settlement reached between the parties at the Mediation, SouthTrust arguing for the inclusion of Paragraph 4 and Collins Holding contending that Paragraph 4 was not part of the agreement reached during the private session between Fred Collins, Dishman and the mediator.

While the parties have to some degree disputed the events surrounding the negotiation of the settlement, the relevant facts for this appeal are not in dispute. The terms of Paragraph 4 and the District Court's Findings of Fact provide the pertinent detail bearing upon whether Collins Holding agreed to the terms of Paragraph 4 and whether Collins Holding's counsel had express authority, as required under Alabama substantive law, to bind Collins Holding to the terms of Paragraph 4.

The District Court expressly found that the "issue concerning early payment of the IGT Judgment [which Paragraph 4 embodied] was not discussed during the private session between [Fred] Collins and Dishman." Pet. App. at 16a-17a, ¶ 27. Although the issue of early payment had been discussed during the portions of the Mediation

held prior to the private session between Fred Collins and Dishman, the mediator "could not recall a 'specific agreement on it . . . .'" Id. at 17a, ¶ 27.

At the end of the Mediation and after Fred Collins had left, Collins Holding's counsel, Theodore J. Sawicki ("Sawicki") reviewed the draft MOU prepared by SouthTrust's counsel. When he read Paragraph 4, he asked Dishman and the mediator whether these terms were discussed and agreed to by Fred Collins during the private session. In response, "Dishman admitted that the subject of [Paragraph] 4 had not even been mentioned during the private session." Id. at 17a-18a, ¶ 31. Collins Holding's counsel signed the MOU anyway.

The District Court's Findings of Fact clearly illustrate the absence of express authority from Collins Holding and Fred Collins to Sawicki to agree and bind Collins Holding to the terms of Paragraph 4. While the District Court notes that the IGT Judgment early payment term was discussed during portions of the Mediation, the District Court did not find that Collins Holding or Fred Collins in fact agreed to such term. The District Court did not find that SouthTrust made a settlement offer to Collins Holding containing such term or that Collins Holding in fact accepted any such offer. At most, the District Court found that there was a "consensus" reached as to the early payment term. There are no corresponding facts found by the District Court which back up this wholly conclusory statement.

Rather, the facts and circumstances of this case indisputably show that Collins Holding and Fred Collins did not and would not have agreed to the additional of a term that would have defeated that very agreement that Fred Collins negotiated with Dishman. Once Fred Collins agreed to be personally liable for the $13 million owed to SouthTrust under the terms of the settlement in exchange

for an $800,000.00 discount, it would instantly become to his advantage to pursue immediate collection of the IGT Judgment so that he could recoup the payments to SouthTrust he had made on behalf of Collins Holding, pay the remainder of the $13 million owed to SouthTrust under the terms of the settlement, and obtain the benefit of the $800,000.00 discount. It would not have been conceivable that Fred Collins would have then agreed to a provision requiring full payment of the SouthTrust loans without the benefit of any discount if the IGT Judgment were collected early. This would have caused Fred Collins to surrender the very discount he had just bargained for in the closed session.

When Fred Collins left the Mediation after reaching a settlement with Dishman, he advised that he was going to "let the lawyers handle the details" and that he would "let the lawyers memorialize the agreement." Pet. App. at 25a, ¶ 14. Letting the attorneys handle the "details" of memorializing the settlement terms agreed to by Fred Collins and Dishman did not authorize Collins Holding's counsel to add new, material terms to the settlement. The facts manifestly demonstrate Collins Holding's counsel lack of express authority to add and bind Collins Holding to the terms of Paragraph 4.

Collins Holding's counsel, Sawicki, admitted that he could have telephoned Fred Collins before Sawicki signed the MOU, but says he chose not to do so. Pet. App. at 25a, ¶ 17. The District Court also determined that "Sawicki's authority to settle was never discussed in any manner during the Mediation or before he helped draft and executed the MOU." Id. at 26a, ¶ 20. The District Court additionally found that "[n]o limitation on Sawicki's authority to settle this action was ever communicated to SouthTrust at the Mediation" and that the "mediator never heard Collins limit or restrict Sawicki's authority to

negotiate on behalf of [Collins Holding.]" Id. at 26a, ¶¶ 21, 23.

While the District Court places a great deal of emphasis that no limitation or restrictions were placed on Sawicki, that emphasis has no legal significance. What is important and implicit in this finding is that there was no affirmative authorization as required by Alabama substantive law to bind Collins Holding to additional terms not discussed during the private session at the Mediation. The District Court never once found that Collins Holding, through Fred Collins, affirmatively and expressly authorized Sawicki to agree to any terms not discussed during the private session. Dishman and the mediator explicitly informed Sawicki that the IGT Judgment early payment term was not discussed between Fred Collins and Dishman during the private session, and there was no corresponding affirmative grant of authority by Collins Holding or Fred Collins to Sawicki to agree to any additional terms.

V. The District Court's Conclusions of Law.

In its Conclusions of Law entered on October 22, 2004, the District Court concluded that the parties entered into a binding settlement agreement at the Mediation, including the terms of Paragraph 4, despite the fact that the District Court never found any facts affirmatively demonstrating that Fred Collins himself or the Collins Holding companies had expressly agreed to the terms of Paragraph 4.

The District Court additionally determined that even if the parties had not entered into an actual agreement that included the terms of Paragraph 4, Collins Holding's counsel, Sawicki, possessed apparent authority to enter into the MOU. This conclusion was made in spite of the

requirement under Alabama substantive law that an attorney must be given express authority to bind a client to a settlement agreement.

The District Court rationalized its conclusion by finding that Georgia law applied to the terms of the settlement reached at the Mediation since the Mediation physically occurred in Georgia. This legal conclusion directly defies Alabama's choice of law principles, which if applied correctly to the facts of this case would have mandated that Alabama substantive law apply to the determination of whether the terms of Paragraph 4 were made a part of the settlement agreement reached between Fred Collins and Dishman during the private mediation session.

VI. The Eleventh Circuit Opinion.

Collins Holding appealed the Order of the District Court to the Eleventh Circuit, arguing that the District Court erred by applying Georgia's substantive law of apparent authority rather than Alabama's substantive law of express authority when virtually all of the parties dealings occurred in Alabama, the parties had executed numerous documents providing for Alabama law to govern their relationship, a lawsuit arising out of this relationship was filed and pending in Alabama, and the Mediation between the parties was held in Georgia for the sole reason of convenience.

Collins Holding also asserted that the District Court could not have found a "meeting of the minds" between the parties on the terms of Paragraph 4 where there was absolutely no evidence in the record that Collins Holding or Fred Collins had ever agreed to that term.

The Eleventh Circuit issued a two-page per curiam Opinion affirming the District Court's Order. The Eleventh Circuit's Order simply finds:

> After reviewing the record and reading the parties' briefs, we conclude that the district court correctly found that the parties entered into a valid settlement containing paragraph 4 of the MOU. Moreover, the district court correctly found that defendants' counsel had the authority to bind defendants to the settlement agreement.

Pet. App. at 4a.

The Eleventh Circuit's Opinion contains no independent review and analysis of the District Court's conclusions of law. The Eleventh Circuit's Opinion is silent on whether the District Court properly applied Alabama's choice of law rules when the District Court used Georgia's substantive law of agency and contracts to reach a conclusion contrary to the conclusion required under Alabama law.

VII. Basis for District Court and Eleventh Circuit Jurisdiction.

The District Court had jurisdiction of this case pursuant to 28 U.S.C. § 1332 because complete diversity existed between citizens of different States and the amount in controversy exceeded $75,000, exclusive of interests and costs. The Eleventh Circuit had jurisdiction of this case pursuant to 28 U.S.C. § 1291 because the appeal was from a final decision of the District Court.

REASONS FOR GRANTING THE PETITION

This case presents a compelling need for the exercise of this Court's supervisory power. The United States

District Court for the Northern District of Alabama chose to break from (1) judicial mandates imposed by this Court, (2) statutorily required obligations, (3) the standard practice of all other federal courts, and (4) adherence to the uniform application of law by the Alabama state courts, by entering an Order that applied the substantive law of a wholly unconnected jurisdiction solely because the parties held a mediation session in that other jurisdiction. The District Court entered this Order without any regard to the principles of Alabama substantive law. As a federal district court sitting in diversity, it was required to have properly applied Alabama's substantive laws and it failed to do so.

The Eleventh Circuit simply affirmed the District Court's Order without undertaking its duty to independently review the District Court's determinations of state law and conclusions of law under the facts of the case.

The considerable departures by both the District Court and the Eleventh Circuit from their judicial functions warrant certiorari review by this Court for the reasons set forth below.

I. The District Court Violated 28 U.S.C. § 1652 and Well-Established Judicial Mandates Set by this Court When It Shifted From Properly Applying Alabama Substantive Law to Applying Georgia Substantive Law Solely Because the Parties Had Mediated the Alabama Dispute in Georgia for Convenience Alone.

The District Court, sitting in diversity in the State of Alabama, entered an Order against Collins Holding that the state courts of Alabama themselves could not have entered. The District Court, in issuing the Order that it did, violated long established federal principles governing a federal district court's duty to apply the substantive state law of the state in which it sits. The District Court's departure from

this settled federal practice stemming from the decisions of this Court merits review on certiorari by this Court. See New York City Transit Auth. v. Beazer, 440 U.S. 568, 570-71 (1979) (granting certiorari to review departure by the district court and the reviewing court of appeals from procedures normally followed in addressing statutory and constitutional questions arising in the same case).

It has been well-established by this Court that independent determinations of state law by a federal district court exercising diversity jurisdiction are prohibited. Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941). A federal district court is required to apply the choice of law principles of the state in which the district court sits. Id. This necessarily requires proper application of that particular state's choice of law rules. In Klaxon, this Court expounded on the guiding principles for requiring a federal district court to adhere to the substantive laws of the state in which it sits:

> We are of opinion that the prohibition declared in Erie Railroad v. Tompkins . . . against such independent determinations by the federal courts extends to the field of conflict of laws. The conflict of laws rules to be applied by the federal court in Delaware must conform to those prevailing in Delaware's state courts. Otherwise the ***accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side.*** . . . Any other ruling would do violence to the principle of uniformity within a state upon which the Tompkins decision is based.

Id. at 496-97 (emphasis added) (citations omitted).

The longstanding decision pronounced in Klaxon has been reaffirmed by this Court and followed by the courts within the Eleventh Circuit. See Day & Zimmermann, Inc. v. Challoner, 423 U.S. 3, 4-5 (1975) (holding that the conflict of laws rules to be applied in a diversity case by a federal district court must conform to those prevailing in the state courts); Boardman Petroleum, Inc. v. Fed. Mut. Ins. Co., 135 F.3d 750, 752 (11th Cir. 1998) (same); Benchmark Med. Holdings, Inc. v. Rehab Solutions, LLC, 307 F. Supp.2d 1249, 1258-59 (M.D. Ala. 2004) (same); Bryant v. Cruises, Inc., 6 F. Supp.2d 1314, 1317 (N.D. Ala. 1998) ("The Supreme Court commands that, in such circumstances, this court is to apply the choice-of-law rules of the state in which it sits.")

This Court precisely summarized the duty and obligation of a federal district court in Day & Zimmermann:

> A federal district court in a diversity case is not free to engraft onto those state rules exceptions or modifications which may commend themselves to the federal court, but which have not commended themselves to the State in which the federal court sits.

423 U.S. at 4.

Despite this long-standing precedent, the District Court in this action chose to apply Georgia law to the construction of the settlement agreement reached during the private session of the Mediation between Fred Collins and Dishman. The District Court chose to apply the substantive law of Georgia, based only upon the fact that the parties had mediated in Georgia for mere convenience, to determine whether the parties had agreed to Paragraph 4 of the MOU.

The decision by the District Court to apply Georgia substantive law rather than Alabama law changed the outcome for Collins Holding and Fred Collins because under Alabama law it has been well-established that an attorney may not negotiate and bind a client in settlement without the express, special authority of the client, while under Georgia law, an attorney can bind his client to a settlement agreement by apparent authority. Warner v. Pony Express Courier Corp., 675 So.2d 1317, 1320 (Ala. Civ. App. 1996) (expounding upon the principle under Alabama law that an attorney may not settle a client's action except on the ***express*** authority of the client); see e.g., Daniel v. Scott, 455 So.2d 30, 32-33 (Ala. Civ. App. 1984) ("The authority to settle is not incidental, but it is essential [under Alabama law] that an attorney have express, special authority from his client to do so."); Pembroke State Bank v. Warnell, 471 S.E.2d 187, 189 (Ga. 1996) (observing that under Georgia law, an attorney has apparent authority to enter into a settlement agreement on behalf of a client).

Under the Findings of Fact issued by the District Court, it is undisputed that the District Court found no evidence that Collins Holding or Fred Collins provided Collins Holding's counsel any express authority to agree to the terms of Paragraph 4 in the MOU. In fact, the only analysis provided by the District Court is related to the issue of apparent authority, which if Alabama law applies - and it should - is irrelevant.

This failure by the District Court to apply the law of Alabama constitutes the fundamental legal error present in this case - an error which deviated from the federal practice standards mandated by this Court and statutorily required under 28 U.S.C. § 1652 ("The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide,

shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.").

Alabama's choice of law rules with respect to contract actions are clear. The Supreme Court of Alabama has long established that where the parties clearly intended the law of a particular jurisdiction to apply, or where the performance of a contract was contemplated in a particular jurisdiction, the law of that jurisdiction (rather than the law of the place where the contract happened to be executed) applies to issue concerning the validity, as well as the performance, of that contract.

In J.R. Watkins Co. v. Hill, the Supreme Court of Alabama set forth these rules:

> The general rule, in the absence of stipulation to the contrary, is that the validity of a contract is judged by the law in the state or country in which the same is entered into . . . . Exceptions to the general rule of lex loci are ***where the parties clearly appear to have legally contracted with reference to the law of another jurisdiction, or where the contract is to be performed in another jurisdiction.***

108 So. 244, 245 (Ala. 1926) (emphasis added) (citations omitted).

The Supreme Court of Alabama further clarified this rule in Franklin Life Ins. Co. v. Ward:

> Stated in other words, the general rule is that the nature, obligation, validity and interpretation of a contract are according to the laws of the state where made, or where performance begins, unless it is apparent that the parties manifest a mutual intention to the contrary, or unless it is to be performed in

> some other place, in which case the law of the other place and of performance will govern.

187 So. 462, 467 (Ala. 1939). "The fact is that the place of performance of a contract usually classifies it as to the laws controlling its execution and enforcement." Id. at 466-47.

This "place of performance" rule has been consistently applied in the Alabama choice of law jurisprudence since those seminal decisions. See e.g., First Nat'l Life Ins. Co. v. Fid. & Deposit Co. of Maryland, 525 F.2d 966, 967 (5th Cir. 1976); Ideal Structures Corp. v. Levine Huntsville Dev. Corp., 396 F.2d 917, 922, 925 (5th Cir. 1968); Owens v. Superfos A/S, 170 F. Supp.2d 1188, 1194-95 (M.D. Ala. 2001).

Under the long standing principle in Alabama that place-of-performance or the express choice of law provisions chosen by the parties dictate the law to be applied to the construction of a contract, it is unequivocal that Alabama law governs the enforcement and interpretation of the settlement agreement between SouthTrust and Collins Holding.

It is undisputed that the parties' settlement contemplated that performance of the settlement would occur in Alabama. The parties' settlement was to effect the resolution of this case, which was commenced and pending in the State of Alabama. All of Collins Holding's settlement payments were required to be made, and were made, in Alabama. No performance of the settlement was contemplated to occur in the State of Georgia.

Furthermore, all of the Loan Documents which were at issue in this case contained Alabama choice-of-law provisions. Under these provisions, Collins Holding had to agree to be bound under Alabama law, and SouthTrust

utilized the benefit of these choice of law provisions to invoke the jurisdiction of the Alabama courts.

The District Court's Order also violates the requirement under Alabama law that the parties must have an assent or "meeting of the minds" to create a valid contract. Farmers & Merchants Bank of Centre v. Hancock, 506 So.2d 305, 310 (Ala. 1987). The District Court's Findings of Fact do not reference any affirmative evidence in the record that Collins Holding ever agreed to the terms of Paragraph 4. In fact, it is undisputed that the parties never discussed the terms of an IGT Judgment early payment contingency during the private session held between Fred Collins and Dishman in which a settlement was reached.

The Trial Court's application of Georgia substantive law to the construction of the settlement agreement lacked any basis under the Alabama choice of law principles and federal precedent in applying the law of the state in which the District Court sits. There was absolutely no justification for the District Court's abrupt shift to the imposition of Georgia substantive law to the determination of the parties' rights and obligations under the terms of their settlement agreement. As a federal district court sitting in the State of Alabama, it was required to have applied the substantive laws of that forum, not the substantive laws of the mediation's forum.

The District Court radically exceeded the limits impressed upon it by both 28 U.S.C. § 1652 and the federal practice mandates established by this Court when it chose to disregard clearly defined Alabama agency and contract law and choice of law rules. This deviation from its authority by the District Court should be reviewed and remedied by this Court.

II. The District Court's Order Adversely Disrupts the Uniform Application of Alabama Substantive Law within the State of Alabama and Deprives Collins Holding and Fred Collins of the Right to Obtain the Benefits of the Settlement Agreement Negotiated with SouthTrust.

The District Court's Order produces two primary adverse effects which only further highlight the great need for certiorari review by this Court.

The District Court sitting in the State of Alabama entered an Order of judgment that the state courts of Alabama could not have entered. The District Court has violated the very principles pronounced in Klaxon requiring uniform application of law and administration of justice by state and federal courts sitting side by side in the same state. The District Court has taken advantage of the "accident of diversity of citizenship" and enforced its own independent general law despite the clear mandates under Alabama law.

Furthermore, the Order of the District Court fundamentally deprives Collins Holding of its rights with respect to the settlement agreement. With respect to the ability of an attorney to bind a client to a settlement agreement, Georgia law is substantially different and significantly alters the nature of the attorney-client relationship. Under Alabama law, the only conclusion to be reached is that the terms of Paragraph 4 are not binding upon Collins Holding because Fred Collins never agreed to that term and because Collins Holding's counsel did not have express authority to bind Collins Holding to that term.

This Paragraph 4 materially modified the agreement reached by Fred Collins and Dishman during the private session of the Mediation. Fred Collins negotiated to personally repay Collins Holding's indebtedness for a discount of the total amount owed. He needed Collins

Holding to retain possession and control of the IGT Judgment so that once IGT did pay on the judgment, Fred Collins would be able to recoup what he personally infused into the company, through personal repayment to SouthTrust, and ensure that he and Collins Holding continued to receive the benefit of the discounted value of the loans. Fred Collins had an incentive at this point to pursue immediate collection of the IGT Judgment.

Paragraph 4 alters the entire nature of the settlement agreed upon by Fred Collins and Dishman at the private session during the Mediation, because now, if Fred Collins succeeds in having IGT pay the judgment quickly, Paragraph 4 forfeits the very discount for Collins Holding that he negotiated and bargained for.

By disregarding the clear directives of Alabama law and imposing this term upon Collins Holding, the District Court not only usurped its authority under the applicable judicial and statutory requirements, but also divested Collins Holdings and Fred Collins personally of the rights they had under the settlement agreement reached with SouthTrust.

III. The Eleventh Circuit Failed in its Duty to Independently Review the District Court's Determinations of State Law.

On appeal to the Eleventh Circuit, the District Court was summarily affirmed in an unpublished Opinion that does not disclose that Georgia law was being applied on the justification that the Mediation was held in Georgia. With respect to the merits of the case, the Opinion merely provides:

> After reviewing the record and reading the parties' briefs, we conclude that the district court correctly found that the parties entered into a valid settlement

> containing paragraph 4 of the MOU. Moreover, the district court correctly found that defendants' counsel had the authority to bind defendants to the settlement agreement.

Pet. App. at 4a.

The issuance of this Opinion by the Eleventh Circuit does not meet the standards of appellate review established by this Court in Salve Regina College v. Russell, 499 U.S. 225 (1991). The choice of law determinations by the District Court were subject to *de novo* review on appeal. Sigalas v. Lido Mar., Inc., 776 F.2d 1512, 1516 (11th Cir. 1985) (holding that the resolution of choice of law questions is subject to independent review on appeal). Legal conclusions made by the District Court are also subject to *de novo* review by the appellate court. See Ruiz v. Tenorio, 392 F.3d 1247, 1251 (11th Cir. 2004).

This Court has reaffirmed and mandated that "a court of appeals should review *de novo* a district court's determinations of state law." Salve Regina College, 499 U.S. at 231. This Court best explained the sound reasoning behind this requirement:

> The obligation of responsible appellate jurisdiction implies the requisite authority to review independently a lower court's determinations.
>
> Independent appellate review of legal issues best serves the dual goals of doctrinal coherence and economy of judicial administration. District judges preside alone over fast-paced trials: Of necessity they devote much of their energy and resources to hearing witnesses and reviewing evidence. . . . [T]rial judges often must resolve complicated legal

> questions without benefit of "extended reflection [or] extensive information." . . .
>
> Court of appeals, on the other hand, are structurally suited to the collaborative juridical process that promotes decisional accuracy. With the record having been constructed below and settled for purposes of the appeal, appellate judges are able to devote their primary attention to legal issues.
> . . .
> Independent appellate review necessarily entails a careful consideration of the district court's legal analysis, and an efficient and sensitive appellate court at least will naturally consider this analysis in undertaking its review.

Id. at 231-32 (citations omitted).

The Eleventh Circuit failed in its obligation and duty to independently review the District Court's determinations of Alabama state law, with respect to both the determination of Alabama choice of law principles and the District Court's legal application of Alabama's laws regarding the valid formation of a contract. The Eleventh Circuit's inaction on appeal has the effect of both departing from the accepted and usual course of judicial proceedings for an appellate court and sanctioning a departure by the District Court.

When *de novo* review is compelled and the appellate court chooses to simply defer to the lower court's determinations, the exercise of this Court's supervisory power is necessitated. See Marshall v. U.S., 360 U.S. 310, 310-11 (1959) (finding actions of the lower courts so prejudicial to petitioner that the exercise of this Court's supervisory review was warranted).

IV. The Issue of Whether a Federal District Court Sitting in One Jurisdiction Can Impose the Law of a Second Jurisdiction Solely Because the Parties Chose to Mediate the Case in the Second Jurisdiction Presents an Important and Recurring Issue that Warrants This Court's Review.

The ground breaking decision below creates a significant and wide reaching conflict in the federal courts and between federal and state courts sitting in the same state on the question of whether a court sitting in and applying the law of one jurisdiction can apply the law of a second jurisdiction purely because a mediation session was held in the second jurisdiction. Every civil case pending in the Eleventh Circuit is now potentially affected by this new principle of substituting the controlling law of the forum with the controlling law of the site of a mediation session.

Virtually every civil case has a likelihood of being mediated. Forum shopping and inconsistency would necessarily become supremely important because it could literally change the substantive law of the case. Because the Eleventh Circuit has endorsed the decision to apply the law of the mediation site, this case presents a recurring issue of paramount importance.

Mediation is highly common and the nature of diversity jurisdiction is that mediation conferences or sessions will often be held in locations other than where the federal district court in which the case is pending sits. The Eleventh Circuit's decision not only encourages forum shopping for jurisdictional filing of actions and forum shopping between federal and state courts, but also forum shopping for mediation sites as well.

The Eleventh Circuit's approval of the District Court's decision in this case to unexpectedly switch from applying Alabama substantive law, as required under

judicial and statutory mandates, to applying Georgia substantive law, solely because the parties chose to have the Alabama lawsuit mediated in Georgia, conflicts with the practice of all other federal courts.

The Eleventh Circuit's affirming opinion also approves of the inconsistency in outcomes reached by district courts and state courts sitting the same state deciding the exact same issues. Consequentially, every litigant in the Eleventh Circuit may now be potentially treated by the district courts sitting in the Eleventh Circuit in a manner in conflict with not only the other federal circuits, but in conflict with the state courts sitting within the Eleventh Circuit.

Parties and judges need to decide where to hold mediations in all pending civil cases in the Eleventh Circuit. The issue presented by the case at bar therefore needs to be decided now to avoid a potential rash of appeals by parties who find themselves transported from law affirming their positions to law opposing their positions.

This case presents an appropriate vehicle to resolve this issue and the resulting conflict between the Eleventh Circuit's decision and the practice of all other federal courts and those states sitting within the Eleventh Circuit because the law of Alabama and the law of Georgia are so clearly in conflict on the central issue in dispute that the choice of law of the mediation site is outcome determinative. Furthermore, the decision of the District Court to apply the law of the mediation site is overt and clearly articulated.

This is not an issue that would be enlightened and informed by waiting for it to mature through more cases and decisions. To the contrary, the issue pleads for early resolution.

Applying the law of a mediation site is a crisp legal issue. Litigants in the states of the Eleventh Circuit need certainty and uniformity in the choice of law that will control their case. The possibility that the initial choice of law may shift to that of another jurisdiction because of the happenstance of mediation geography needs prompt resolution by this Court.

The decisions rendered by the District Court and the Eleventh Circuit below present a critical issue of great practical importance. Without review by this Court of the decision of the Eleventh Circuit, there will be no uniformity and predictability when a mediation is held outside the forum court in a case pending in the federal courts only by the mere "accident of diversity." Therefore, further review by this Court is not only appropriate, but warranted.

CONCLUSION

For the reasons set forth herein, the Petition for a Writ of Certiorari should be granted.

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ATTORNEYS FOR PETITIONERS

October 12, 2005

APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-15957

District Court Docket No.
04-00354-CV-P-S

[Filed with the U.S. Court of Appeals, Eleventh Circuit May 11, 2005 Thomas K. Kahn, Clerk]

[Filed with the U.S. District Court N.D. of Alabama on July 27, 2005]

SOUTHTRUST BANK, an Alabama Banking Corporation,

Plaintiff-Appellee
Cross-Appellant,

versus

COLLINS HOLDING CORPORATION, f.k.a Collins Music Co. Inc., et al.,

Defendants-Appellants
Cross-Appellees.

Appeals from the United States District Court
for the Northern District of Alabama

JUDGMENT

It is hereby ordered, adjudged, and decreed that the attached opinion included herein by reference, is entered as the judgment of this Court.

Entered: May 11, 2005
For the Court: Thomas K. Kahn, Clerk
By: Gilman, Nancy

ISSUED AS MANDATE
JULY 25, 2005
U.S. COURT OF APPEALS
ATLANTA, GA.

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-15957
Non-Argument Calendar

[Filed with the U.S. Court of
Appeals, Eleventh Circuit
May 11, 2005
Thomas K. Kahn, Clerk]

D.C. Docket No. 04-00354-CV-P-S

SOUTHTRUST BANK, an Alabama
Banking Corporation,

Plaintiff-Appellee
Cross-Appellant,

versus

COLLINS HOLDING CORPORATION,
f.k.a Collins Music Co. Inc., et al.,

Defendants-Appellants
Cross-Appellees.

Appeals from the United States District Court
for the Northern District of Alabama

(May 11, 2005)

Before BIRCH, DUBINA and BARKETT, Circuit Judges.

PER CURIAM:

This case was presented to the district court on cross-motions to enforce a settlement agreement reached at the conclusion of a mediation that took place in Atlanta, Georgia. After conducting an evidentiary hearing, the district court found that the parties entered into a valid settlement that included paragraph 4 of the Memorandum Of Understanding ("MOU").

The question of whether the parties intended to enter into a valid settlement agreement is a question of fact subject to the clearly erroneous standard of review. *See Lee v. Hunt*, 631 F.2d 1171, 1177 (5th Cir. 1980).[1] The question of whether an attorney had the requisite authority to bind his client to a settlement agreement is also a question of fact subject to the clearly erroneous standard of review. *Gymco Constr. Co. v. Architectural Glass and Windows, Inc.*, 884 F.2d 1362, 1364 (11th Cir. 1989).

This court reviews a district court's conclusions of law *de novo*. *Sunderland Marine Mut. Ins. Co. v. Weeks Marine Const. Co.*, 338 F.3d 1276, 1277 (11th Cir. 2003).

After reviewing the record and reading the parties' briefs, we conclude that the district court correctly found that the parties entered into a valid settlement containing paragraph 4 of the MOU. Moreover, the district court correctly found that defendants' counsel had the authority to bind defendants to the settlement agreement.

---

[1] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), we adopted as binding precedent the decisions of the former Fifth Circuit handed down prior to October 1, 1981.

SouthTrust Bank has filed a cross-appeal contending that it is entitled to contractual attorneys' fees and collection costs incurred as a result of the defendants' appeal. We do not read the district court's order requiring SouthTrust "to convey all of the bank's rights, title and interest in and to the notes and loan documents evidencing all of defendants' indebtedness to the bank" as precluding SouthTrust from requesting contractual attorneys' fees and collection costs following resolution of this appeal. We agree with the defendants that SouthTrust's requests for attorneys' fees and costs is premature. Accordingly, we affirm the district court's judgment.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Case No.: CV-04-P-0354-S

[Filed and Entered October 22, 2004]

SOUTHTRUST BANK, an Alabama
banking corporation,

Plaintiff,

v.

COLLINS HOLDING CORPORATION,
f/k/a Collins Music Co., Inc.,
a/k/a Collins Music Company, Inc., et al.,

Defendants.

ORDER

This matter comes before the court on the following motions: Plaintiff's Motion for Order to Enforce Settlement Agreement (Doc. #25); Plaintiff's Motion for Order to Find That No Settlement Agreement Exists Between the Parties (Doc. #35); Defendants' Motion for Enforcement of Settlement Agreement (Doc. #26); and Defendants' Amended Motion for Enforcement of Settlement Agreement (Doc. #41).

In accordance with the Findings of Fact and Conclusions of Law entered contemporaneously with this Order, the court **ORDERS AND DIRECTS** as follows:

(1) Plaintiff's Motion for Order to Enforce Settlement Agreement (Doc. #25) is **GRANTED**;

(2) Defendants' Motion for Enforcement of Settlement Agreement (Doc. #26) and Defendants' Amended Motion for Enforcement of Settlement Agreement (Doc. #41) are **DENIED**;

(3) Plaintiff's Motion for Order to Find That No Settlement Agreement Exists Between the Parties (Doc. #35) is **MOOT**;

(4) SouthTrust is entitled to immediate payment of $1,241,348.89 from the $1,500,000.00 remaining balance of the sum of $16,805,324.97 previously deposited with the Clerk of this Court pursuant to order of the Second Judicial District Court of the State of Nevada In and For the County of Washoe dated April 5, 2004, in the case styled *Collins Music Co., Inc. v. IGT*, Case No. CV02-00665 ("remaining balance of the Deposit");

(5) Accordingly, the Clerk of Court is hereby **DIRECTED** to immediately distribute from the remaining balance of the Deposit the sum of One Million, Two Hundred Forty-One Thousand, Three Hundred Forty-Eight Dollars and Eighty-Nine Cents ($1,241,348.89), plus accrued pro rata interest on that amount contained in the court

registry,[1] to SouthTrust pursuant to payment instructions provided to the Clerk of Court;

(6) The Clerk of Court is **FURTHER DIRECTED** to immediately distribute from the Deposit the balance of the remaining funds, plus accrued pro rata interest on that amount contained in the court registry, to Defendants, pursuant to payment instructions provided to the Clerk of Court;

(7) SouthTrust is **DIRECTED** to convey to Defendants and Collins all of the Bank's rights, title and interest in and to the notes and loan documents evidencing all of Defendants' indebtedness to the Bank that is the subject of this action, and

(8) This action is **DISMISSED WITH PREJUDICE**. Costs are taxed to Defendants.

DONE and **ORDERED** this 22nd day of October, 2004.

/s/ R. David Proctor
R. DAVID PROCTOR
UNITED STATES DISTRICT JUDGE

[1] The interest calculation **SHALL NOT** take place until after the Clerk of Court charges the Administrative Assessment Fee against the interest accrued.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Case No.: CV-04-P-0354-S

[Filed and Entered October 22, 2004]

SOUTHTRUST BANK, an Alabama
banking corporation,

Plaintiff,

v.

COLLINS HOLDING CORPORATION,
f/k/a Collins Music Co., Inc.,
a/k/a Collins Music Company, Inc., et al.,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This matter comes before the court on cross-motions to enforce a settlement reached during a mediation that occurred on March 16, 2004, in Atlanta, Georgia ("Mediation"). Pursuant to a prior Order entered by this court, SouthTrust has already received payment of $13,000,000.00 pursuant to this Settlement. The present dispute is whether SouthTrust is entitled to any additional money under the settlement reached at the Mediation.

Presently pending before court are: Plaintiffs Motion for Order to Enforce Settlement Agreement (Doc. #25); Plaintiff's Motion for Order to Find That No Settlement Agreement Exists Between the Parties (Doc. #35); Defendants' Motion for Enforcement of Settlement Agreement (Doc. #26); and Defendants' Amended Motion for Enforcement of Settlement Agreement (Doc. # 41). The parties have filed Memoranda of Law and Supplemental Briefs in support of their respective motions, which the court has reviewed and considered. Further, the court has conducted an evidentiary hearing, carefully considered and weighed the evidence presented, and evaluated the credibility of the witnesses.

After due consideration for the premises of the respective motions, and after careful consideration of the evidence, the legal authorities and the arguments of counsel, the court makes the following Findings of Fact and Conclusions of Law, and consequently, shall enter a Final Order:

(A) Granting Plaintiff's Motion for Order to Enforce Settlement Agreement (Doc. #25), and denying as moot its Motion for Order to Find That No Settlement Agreement Exists Between the Parties (Doc. #35);

(B) Denying Defendants' Motion for Enforcement of Settlement Agreement (Doc. #26) and Defendants' Amended Motion for Enforcement of Settlement Agreement (Doc. # 41);

(C) Directing the Clerk of Court to pay to Plaintiff the amount of $1,241,348.89, plus

accrued pro rata interest[1] on that amount contained in the court registry, and further directing the Clerk of Court to pay the balance of the remaining funds, plus accrued pro rata interest on the remaining funds, to Defendants;

(D) Directing SouthTrust to convey to Defendants and Collins all of the Bank's rights, title and interest in and to the notes and loan documents evidencing all of Defendants' indebtedness to the Bank that is the subject of this action; and

(E) Dismissing this action with prejudice, with costs taxed to Defendants.

I. STIPULATED FACTS

1. Plaintiff SouthTrust Bank ("SouthTrust" or the "Bank") is an Alabama banking corporation with its principal office in Birmingham, Alabama.

2. Defendants Collins Holding Corporation ("CHC") and Carolina Redemption, Inc. are South Carolina corporations with their principal places of business in South Carolina. Collins Coin, Inc. and Collins Games of Georgia, Inc. are Georgia corporations with their principal places of business in Georgia. 501(c)(3) Charity Consultants, Inc. is an Ohio corporation with its principal place of business in Ohio. These named Defendants are collectively hereinafter referred to as "Defendants."

---

[1] The interest calculation shall not take place until after the Clerk of Court charges the administrative assessment fee against the interest accrued.

3. Fred J. Collins ("Collins") is the Chief Executive Officer, President and controlling shareholder of numerous corporations, including Defendants.

Loans

4. Beginning in 1996, in a series of loans, SouthTrust loaned money to CHC and to other entities owned and controlled by Collins. Many of these additional corporate entities have since been merged into CHC and thus no longer exist. This series of loans was made solely to the corporations and Collins never provided SouthTrust with any personal guarantee for the corporate debt.

5. The loans are evidenced by Loan Agreements, Promissory Notes, Security Agreements, Financing Statements, Extension Agreements and other documents (collectively the "Loan Documents"). The Bank obtained security interests in certain assets of Defendants. The Loan Documents uniformly provided that any dispute or legal action regarding the loans and transactions between the Bank and Defendants was to be governed by Alabama law and to be heard by a court of competent jurisdiction in Alabama.

6. Pursuant to the Loan Documents, Defendants promised to pay to SouthTrust all indebtedness due and owing thereunder, including principal, interest, bank late fees, attorneys' fees, and collection costs.

7. As security for the Loans and pursuant to the Loan Documents, Defendants granted to SouthTrust a security interest in all of Defendants' inventory, documents, instruments, chattel paper, equipment, general intangibles, and accounts whether then owned or thereafter acquired (the "Collateral").

8. SouthTrust properly perfected its security interest in the Collateral by filing UCC-1 financing statements in South Carolina, Georgia, Alabama, Colorado, Florida, Indiana, Kentucky, Louisiana, Mississippi, Minnesota, Montana, Texas, South Dakota, West Virginia, and Wisconsin.

9. During the term of the Loans, SouthTrust made efforts to assist Defendants in working out the Loans and avoiding default. Despite these attempted workouts, default under the Loan Documents occurred.

10. In October 2001, CHC was in default of its obligations to SouthTrust. At CHC's request, SouthTrust agreed to enter into the Extension Agreement dated November 1, 2001, pursuant to which SouthTrust gave CHC additional time to pay the indebtedness, to April 30, 2002, with the option to extend the due date to October 31, 2002, provided that several conditions were met (the "Extension Agreement"). Pursuant to a letter agreement between the parties dated November 14, 2002, SouthTrust further extended the deadline for repayment to July 1, 2003.

IGT Judgment

11. On August 2, 2001, the Court of Common Pleas for Horry County, South Carolina entered a verdict and judgment in favor of CHC for breach of contract and breach of contract accompanied by fraudulent act against International Games Technology ("IGT"), a Nevada-based company, in the amount of $15,000,000.00 (hereinafter referred to as the "IGT Judgment"). IGT, a substantial Nevada company, pursued numerous appeals through the South Carolina appellate courts and to the Supreme Court of the United States. IGT lost at each stage. Despite these losses, IGT had not paid the

IGT Judgment at the time this lawsuit was commenced. IGT continues to appeal the IGT Judgment.

12. SouthTrust contended that they had a perfected security interest in the IGT Judgment. SouthTrust made demand, by letter dated May 30, 2003 (the "Demand Letter"), on IGT, that IGT as a judgment/account debtor of CHC, pay the Judgment directly to SouthTrust. One of the defenses raised by CHC in this lawsuit is that SouthTrust did not have a perfected security interest in the IGT Judgment.

13. The attorneys who represented CHC in the litigation against IGT (the "CHC Attorneys") brought an action in Nevada (the "Nevada Action") to enforce the Judgment and so that they could be paid the contingency fee that was owed to them and in an attempt to domesticate that Judgment in the state wherein IGT has its principal place of business.

The Current Action

14. On February 10, 2004, SouthTrust exercised its rights under the Loan Documents and filed its Complaint in the current action in the Circuit Court of Jefferson County, Alabama, simultaneously filing its Motion for Writ of Seizure to obtain possession and control of the IGT Judgment.

15. Defendants timely removed the current action to this court on the basis of diversity.

16. SouthTrust renewed its Motion for Writ of Seizure in this court. The hearing on the Motion for Writ of Seizure, which Defendants opposed, was set by this court for Friday, March 19, 2004.

17. By the time this lawsuit was commenced, Defendants were in default on their loans from the Bank. Defendants owed SouthTrust $13,788,276.38 in outstanding balance, interest and bank charges, exclusive of attorney's fees and collection costs, as of March 1, 2004. The outstanding principal amount as of March 31, 2004, was $12,882,000.00.

18. As of March 1, 2004, the IGT Judgment with accruing post-judgment interest calculated at the rate of 14% per annum, was in excess of $20,000,000.00.

19. After the removal, Plaintiff re-filed its motion in this court and contacted the court to schedule a hearing date for its motion. The court scheduled a hearing for the Motion for Writ of Seizure for March 19, 2004. During the scheduling teleconference, the court encouraged the parties to attempt to mediate the dispute prior to the hearing date.

The Mediation

20. SouthTrust and Defendants submitted their dispute to mediation on Tuesday, March 16, 2004, in Atlanta, Georgia before William F. Welch (the "Mediator"), a mediator agreed upon by all parties.

21. The Mediation occurred in Atlanta, Georgia. Neither this court nor the parties required any specific place for the Mediation, but Atlanta was chosen because it was convenient for everyone, including Ben E. Dishman, a SouthTrust Vice President, who had recently moved to Atlanta; Theodore Sawicki, litigation counsel for CHC; and the other parties and attorneys who reside in Alabama and South Carolina.

22. Appearing at the Mediation on behalf of SouthTrust were Ben E. Dishman, and Carol Stewart and Stephanie Williams, litigation counsel for SouthTrust. Dishman was SouthTrust's representative and had primary responsibility for the loans to the Defendants.

23. Appearing on behalf of the Defendants at the Mediation were Collins, owner of the Defendants, Jerry Saad, a CPA who was Collins' financial advisor, Jim Cassidy, a bankruptcy attorney for the Defendants, and Theodore Sawicki and John Goselin, litigation counsel for Defendants.

24. The Mediation commenced at 10:30 a.m. and concluded at 8:00 p.m., Eastern Standard Time.

25. The Mediation was divided into several segments: (1) standard introductory instructions and remarks; (2) "break-out" sessions during which the mediator conducted "shuttle diplomacy" communicating offers, counteroffers, and other information between the parties; (3) an attorneys-only meeting between the mediator and counsel; and (4) a twenty to forty-five minute meeting between Collins and Dishman, for which the mediator was present.

26. Late in the day, Collins suggested that he and Dishman get together with the mediator alone, without counsel, to see if the impasse could be overcome and a settlement reached. The key issue that remained unresolved was the total amount that would be paid to the Bank in settlement and satisfaction of the Defendants' indebtedness. During this private session, the only issue of substance discussed was the amount of this final payment.

27. The issue concerning early payment of the IGT Judgment was not discussed during the private session

between Collins and Dishman. Although the issue of early payment was discussed earlier, the mediator could not recall a "specific agreement on it, but [he] had a sense that there was a consensus on if there was an early payment . . . that it would be the full amount."

28. All parties and the mediator agree that a settlement was reached on March 16, 2004.

29. Dishman and Collins agreed in the mediator's presence that they had a settlement, and the principals and the mediator returned to the main conference room and announced to counsel that a settlement had been reached. The mediator then excused Collins and the others from South Carolina, and counsel, Dishman and the mediator remained.

30. After Collins and the others left, counsel for SouthTrust then began drafting a Memorandum of Understanding ("MOU") to capture in preliminary form the key terms to which the parties agreed. Paragraph 4 of the MOU read as follows:

> If IGT complies with the Nevada order or otherwise pays the IGT judgment before June 1, 2004, SouthTrust shall receive all outstanding principal, interest and fees due under the Loan Documents, less any payments made by or on behalf of CHC pursuant to this settlement.

31. When Defendants' counsel read ¶ 4, he asked Dishman and Welch whether these terms were discussed and agreed to by Collins at the private session.

In response, Dishman admitted that the subject of ¶ 4 had not even been mentioned during the private session.

32. After a few revisions, counsel for both parties signed the MOU.[2]

33. According to the settlement reached by the parties, CHC was to pay $2,000,000.00 to SouthTrust upon execution of the forbearance agreement and in no event later than March 31, 2004. CHC was to pay $7,000,000.00 to SouthTrust on or before June 1, 2004. The remaining payment term of the settlement was, essentially, in the alternative: CHC would pay to SouthTrust $4,000,000.00 on March 31, 2005, making monthly payments of interest only, for a total purchase price for the Loans of $13,000,000.00 **unless** the Judgment was paid by IGT on or before June 1, 2004, in which case, CHC would be required to pay to SouthTrust all outstanding indebtedness, including principal, interest, late fees, attorneys' fees and collection costs, due and owing under the Loan Documents. The latter alternative would result in CHC being obligated to pay more than $13,000,000.00 to SouthTrust in resolution of this Current Action and the subject default under the Loan Documents.

34. Paragraph 4 of the MOU captures this contingency:

> If IGT complies with the Nevada order or otherwise pays the IGT judgment before June 1, 2004, SouthTrust shall receive all

---

[2] The written MOU, which contemplated a separate forbearance agreement and a consent judgment, was prepared at the end of the day. The MOU was executed by counsel for SouthTrust and counsel for Defendants on the evening of March 16, 2004, at approximately 8:00 p.m. At the time Collins left, before the MOU was even drafted, the mediator believed that there was a settlement agreement between the parties.

> outstanding principal, interest, and fees due under the Loan Documents, less any payments made by or on behalf of CHC pursuant to this settlement.

35. Defendants argued that, although the MOU was executed by Defendants' counsel at the close of the Mediation, Defendants' counsel did not have authority to agree to ¶ 4 or to execute the MOU on behalf of Defendants. Rather, Defendants argued that the settlement was reached in the private session between the parties, without counsel but with the Mediator, which took place late in the day at the Mediation before the MOU was prepared. Defendants admitted that the settlement agreement they contend was reached was an oral agreement and was never reduced to writing.

36. At the end of the Mediation on March 16, 2004, counsel called the court and left a voice mail message with one of the law clerks that the case had been settled.

37. On March 17, 2004, upon being informed by counsel for the parties that the case had been settled, this court entered an Order of Dismissal, dismissing the case without prejudice and ordering the parties to submit a proposed consent judgment by March 26, 2004, or the case would be dismissed with prejudice (the "March 17, 2004 Order").

38. On Thursday, March 18, 2004, Collins wrote a letter to IGT informing IGT that SouthTrust and Defendants had reached a settlement agreement and advised IGT that pursuant to the settlement agreement "SouthTrust Bank is prohibited from discussing any Collins matter with IGT and its counsel." The Collins

March 18, 2004 letter to IGT has been submitted to the court as Joint Exhibit L.

39. On Friday, March 19, 2004, SouthTrust's counsel forwarded draft copies of the following additional proposed settlement documents to Defendants' counsel: (1) a Forbearance Agreement; (2) a Joint Motion for Consent Judgment; and (3) a Final Judgment By Consent. The draft Forbearance Agreement, Joint Motion for Consent Judgment and Final Judgment by Consent prepared by SouthTrust's counsel have been submitted to the court, collectively, as Joint Exhibit M.

40. On Tuesday, March 23, 2004, Stewart sent an email to Sawicki to follow up with him regarding the draft documents.

41. On March 24, 2004, in the Nevada Action, IGT filed (a) a brief in opposition to the CHC Attorneys' motion to enforce attorneys' lien, (b) a motion for leave to pay the IGT Judgment into either of the Nevada or South Carolina courts, and (c) a copy of this court's March 17, 2004 Order.

42. On the morning of Thursday, March 25, 2004, Collins called Dishman and told him he had been in contact with IGT's president.

43. On the morning of Thursday, March 25, 2004, Stewart sent another email message to Sawicki, again requesting a status update.

44. Mid-day on March 25, 2004, Stewart attempted to contact Sawicki via telephone, leaving a

message with a receptionist/secretary at Sawicki's firm and asking for an immediate response.

45. Shortly after the telephone call, Stewart sent another email message to Sawicki.

46. A few hours later, on March 25, 2004, Stewart again contacted Sawicki via email.

47. A little after 4:00 p.m., Sawicki responded via email that "our delay resulted only from new developments related to IGT's position and a new agreement between Collins and Dishman."

48. Sawicki also faxed a letter, which stated that "[t]here have been some developments related to IGT's position, which have led Collins to make a new agreement with Mr. Dishman."

49. On March 25, 2004, Collins called Dishman and asked if the Bank would be willing to accept $13,000,000.00 in full and final settlement of the matter if the full amount were paid by March 31, 2004, the last day of the Bank's quarterly financial reporting period. Although the Bank authorized Dishman to accept the $13,000,000.00 offer, Dishman never accepted.

50. Although after the Mediation both sides presented offers that would have resolved this case, it is undisputed that no offer was ever accepted and no new agreement was ever consummated.

51. On March 29, this court held a conference with the parties and encouraged the parties to draft a joint consent order addressing the outstanding issues in the case.

52. On March 30, Nevada counsel filed a reply to IGT's motion and brief. CHC argued that SouthTrust had no claim to the Judgment.

53. Thereafter, Collins timely made his first settlement installment payment on March 31, 2004.

54. On April 2, 2004, this court entered a Consent Order, drafted by the parties, which reflects the undisputed terms of the parties' settlement.

55. On April 5, SouthTrust moved to intervene in the Nevada action and presented the Nevada court with this court's April 2 Consent Order.

56. On or about April 6, 2004, the IGT Judgment proceeds were deposited into the registry of this court. Pursuant to the court's April 8, 2004 Consent Order, the Bank was paid an additional $11,000,000.00, for a total payment of $13,000,000.00.

57. Defendants received the balance of IGT Judgment proceeds, less $1,500,000.00, which amount (with interest accruing) remains in the court registry subject to the determination of the parties' pending motions.

II. ADDITIONAL FINDINGS OF FACT

1. Neither party had information prior to the Mediation that would suggest IGT intended to pay the Judgment early. (HT p. 28-29).

2. Fred Collins is a savvy, experienced, sophisticated business man, whose primary businesses are generally in the highly regulated gaming industry. (Testimony of Sawicki, HT pp. 122-23).

3. Collins has been involved in scores of lawsuits and has vast experience dealing with lawyers, with many cases involving large amounts in controversy. (Testimony of Sawicki HT p. 123; Testimony of Collins HT p. 138).

Mediation

4. Collins testified it was his position all along that, if CHC had the money, it would pay SouthTrust and discharge its debt; Collins told Dishman the only way SouthTrust would be repaid is with the proceeds from the IGT Judgment. (Testimony of Collins, HT pp. 11-12).

5. Nevertheless, Collins admitted that he had two motivations during the Mediation: (1) to discount the SouthTrust loan and to use the IGT Judgment uncertainty as leverage and (2) to not interrupt the 14% post judgment interest he was receiving on the IGT Judgment. (Testimony of Collins HT p. 25-27).

6. Collins believed that IGT Judgment was one of the most significant assets CHC had. (Testimony of Collins, HT p. 16).

7. The only "logjam" or impasse issue during the Mediation was the amount of the third payment installment, which ultimately determined the amount of entire settlement. (HT p. 19-20).

8. The mediator characterized the Mediation as a "lawyers' mediation." (Welch Depo. p. 33).

Discussions Regarding ¶ 4

9. The contingency of early payment by IGT (memorialized in ¶ 4) was discussed at least four times during the Mediation: during opening statements, in the Defendants' caucus session with the mediator, during the attorneys-only session, and during the drafting of the MOU. (HT pp. 23-24; 28-50; 73).

10. Defendants knew that ¶ 4 was a term that SouthTrust had to have in the settlement agreement. (Testimony of Sawicki, HT pp. 73, 129.) Despite the term being discussed multiple times, Defendants never rejected the early payment by IGT term. (HT p. 44).

11. Both the mediator and Dishman testified that during the Mediation there was a consensus reached as to the early payment term before the private session began. (HT p. 20, 28; Welch Dep. at 42).

12. During the private session, Collins and Dishman did not discuss any of the details already discussed and agreed to by consensus earlier in the Mediation, including ¶ 4 and ¶ 8 of the MOU. (HT, p. 30, 37, 58, 67).

13. Sawicki told Stewart that he did not think ¶4 would be a problem and Welch added it to his list of items not in dispute. (HT, p. 31-32). Sawicki testified that "because we didn't think [IGT paying early] was a likely event, I said I don't think it's going to be a problem in the sense that I don't want to tube this settlement process on this relatively unlikely issue." (Testimony of Sawicki, HT, p. 33).

Signing of MOU

14. After the private session Collins left the Mediation early and expressly stated, "I am going to let the lawyers handle the details," that he would "let the lawyers memorialize the agreement," or some variation thereof.[3] (HT pp. 74-75; 141).

15. Based on the ground rules given by the mediator, Collins knew that there would be a written memorandum of understanding prepared after he left the Mediation that would memorialize the agreement negotiated that day. (HT pp. 75; 139; Joint Ex. K). Collins knew that Sawicki would be signing the agreement on behalf of Defendants. (HT pp. 75-76).

16. The MOU was drafted from scratch that evening during the Mediation. The MOU terms, including ¶ 4, were called out and typed in to a computer and all counsel contributed to its drafting. (HT pp. 70-71).

17. Sawicki admitted he could have called Collins on his cell phone before signing the MOU, but says he chose not to because he felt that Collins was too emotionally drained. (HT pp. 37-38).

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[3] It is not lost on the court that the mediator referred to the early payment contingency as a "detail." (Welch Dep. at 42-43; Ex. 1, Draft Declaration at ¶ 7). Specifically, he noted that "[n]umerous implementing side issues had been discussed earlier in the day, including where there was an early payout by the judgment debtor IGT. It was acknowledged by Messrs. Dishman and Collins that the lawyers were to draw up the details." (Welch Dep., Ex. 1, Draft Declaration at ¶ 7). Welch said that he "didn't see [the contingency of early IGT payment] as a super important issue that I faced as an arbitrator." (Welch Dep. at 42). He also testified that a consensus was reached about that detail. (Welch Dep. at 42).

18. During the drafting of the MOU, Sawicki specifically edited ¶ 4 to protect his clients' interests. (HT pp. 71; 124-25; 129-30; ST Ex. 2A).

Sawicki's Authority

19. The employment agreement between the Defendants and Alston & Bird provides that the law firm was engaged to serve as counsel to the Defendants in the Alabama case and in connection with other claims or disputes arising out of the Loan Documents. (Testimony of Sawicki, HT p. 112; Joint Ex. O).

20. Sawicki's authority to settle was never discussed in any manner during the Mediation or before he helped draft and executed the MOU. (HT p.113, Collins Depo. pp. 60; 73; 76-77).

21. No limitation on Sawicki's authority to settle this action was ever communicated to SouthTrust at the Mediation. (HT pp. 112-14).

22. Dishman understood that Sawicki had authority to settle the case on behalf of Defendants and to bind Defendants by signing the MOU. (HT p. 75).

23. The mediator never heard Collins limit or restrict Sawicki's authority to negotiate on behalf of Defendants. (Welch Dep. at 76).

24. The mediator believed that it was reasonable for SouthTrust to believe that Sawicki had authority to settle the case even after Collins left the Mediation. (Welch Dep. at 85).

Dishman's Authority

25. Dishman had authority from his supervisor, Fred Crum, to settle the case at a specified amount. (Testimony of Dishman, HT pp. 16-17).

26. During the private session of the Mediation, Dishman excused himself to call Crum, at which time Dishman recommended that he be given authority to settle the case for $13,000,000.00 based on the Defendants' agreement that if the IGT Judgment was paid before June 1, SouthTrust would receive everything it was owed under the Loan Documents. (HT 68-69). Based on those exact terms, Crum gave Dishman the authority to settle the case; Dishman did not have the authority to settle the case without the early payment term. (HT 118-22).

Post-Mediation Events

27. After the Mediation, Collins contacted IGT and learned that early payment of the Judgment was being considered by IGT. (Testimony of Collins, HT 28-29).

28. After the Mediation, Collins changed course (or changed his business plan) from the day before. He testified that his business plan had changed from letting the 14% interest continue to accrue as long as possible to vigorously pursuing the early payment by IGT so he would not have to pay $2,000,000.00 out of his own pocket. (HT pp. 27-28; 65-66; 95; 111).

29. On March 17, Sawicki faxed the executed MOU to Collins and Saad without highlighting or inquiring about ¶ 4. Collins raised an issue about ¶ 4 with Sawicki

first. (HT pp. 51-52). Paragraph 4 of the MOU did not fit into Collins' new business plan. (HT pp. 65-66; 95; 111).

30. Collins called Sawicki and instructed him to remove ¶ 4 from the agreement. They discussed how best to handle this goal, and "it was decided that [the Defendants] would deal directly with Dishman because that's what Collins had done all along." (Sawicki Dep. p. 54; Collins Dep. pp. 18-19).

31. Collins, Sawicki, and Jerry Saad, Collins' financial advisor, decided that Saad should call Dishman because he had the best relationship with Dishman. (HT p. 29; 52-53).

32. Saad called Dishman and informed him there was a problem about ¶ 4, but that Collins intended to stand by the settlement that was reached between them the night before. (Collins Dep. pp. 19-20, 29; Dishman Dep. pp. 52-53). Saad told Dishman that Collins felt that ¶ 4 "was never clearly discussed, and he clearly never agreed to it and that it was not discussed in that meeting."[4] Dishman responded that "the bank has to have [the term]." Saad said, "Well Collins might be calling you back" and "We're not going to back out of the deal." (HT pp. 54-58).

33. At least three drafts of the settlement agreement containing ¶ 4 were prepared and circulated internally by Sawicki after the Mediation. (HT pp. 59; 110; 135; ST Ex. 3A-3C).

34. On March 18, Collins and Saad prepared a letter to IGT informing IGT that there had been a

[4] The court rejects Saad's assertion as even his testimony at the hearing indicated that the subject matter of ¶ 4 was discussed during the Mediation. (Testimony of Saad, HT pp. 46-47).

settlement agreement and that IGT was to have no communication with SouthTrust. (Joint Ex. L).

35. On March 24, because IGT filed a motion to pay the Judgment into court, Collins and Sawicki learned that the IGT Judgment was going to be paid. (Sawicki Depo. p. 41; 46; 56).

36. Prior to March 25, 2004, no representative of Defendants ever communicated to this court that there was any problem with the MOU and, therefore, the court dismissed this case on March 17 based upon the telephone call from counsel regarding the settlement. Defendants did not advise the court or counsel for SouthTrust that there was a dispute regarding ¶ 4 until approximately 5 p.m. on March 25, the day before the settlement documents were due to court or, absent such a filing, the case would be dismissed with prejudice. (HT p. 132).

III. CONCLUSIONS OF LAW

A Valid, Enforceable Agreement Which Included ¶ 4 Was Contemplated, Discussed, Negotiated, Agreed to, and Memorialized During the Mediation.

1. The court finds that, based upon the testimony and evidence presented, the possibility of IGT paying the Judgment before June 1, 2004, although considered unlikely, was contemplated, discussed, negotiated, agreed to, and memorialized as an agreement during the Mediation. Accordingly, based upon the facts as outlined below, the court finds that the parties negotiated and entered into a binding settlement agreement on March 16, 2004, which was memorialized in the written MOU, that included the contingency regarding IGT early payment contained in ¶ 4 of the MOU:

(A) It was Collins' position all along that, if Defendants had the money, they would pay SouthTrust and discharge the debt; Collins told Dishman the only way SouthTrust would get paid is with the proceeds from the IGT Judgment. (Testimony of Collins, HT pp. 11-12).

(B) The early payment by IGT issue (¶ 4) was discussed at least four times during the Mediation: during opening statements, in the Defendants' caucus session with the mediator, during the attorneys only session, and during the drafting of the MOU. (HT pp. 23-24; 28-50; 73).

(C) Defendants knew that ¶ 4 was a term that SouthTrust had to have in the settlement agreement. (Testimony of Sawicki, HT pp. 73, 129). Despite the term being discussed multiple times, Defendants never rejected the early payment by IGT term. (HT p. 44).

(D) Both the mediator and Dishman testified that there was a consensus reached as to the early payment term before the private session. (HT p. 20, 28; Welch Dep. at 42).

(E) Sawicki told Stewart that he did not think ¶ 4 would be a problem and Welch added it to his list of items

not in dispute. (HT, p. 31-32). Sawicki testified that "because we didn't think [IGT paying early] was a likely event, I said I don't think it's going to be a problem in the sense that I don't want to tube this settlement process on this relatively unlikely issue." (Testimony of Sawicki, HT, p. 33).

(F) After the private session Collins left the Mediation early and expressly stated, "I am going to let the lawyers handle the details," that he would "let the lawyers memorialize the agreement," or some variation thereof. (HT pp. 74-75; 141).

(G) Based on the ground rules given by the mediator, Collins knew that there would be a written memorandum of understanding prepared after he left the Mediation that would memorialize the agreement negotiated that day. (HT pp. 75; 139; Joint Ex. K). Collins knew that Sawicki would be signing the agreement on behalf of Defendants. (HT pp. 75-76).

(H) Sawicki admitted he could have called Collins on his cell phone before signing the MOU, but he chose not to do so. (HT pp. 37-38).

(I) Sawicki signed the MOU and during the drafting of the MOU,

Sawicki specifically edited ¶ 4 to protect his clients' interests. (HT pp. 71; 124-25; 129-30; ST Ex. 2A).

(J) After the Mediation, Saad called Dishman and, although he expressed concern over ¶ 4, he assured Dishman that Collins intended to stand by the settlement that was reached between them the night before and "We're not going to back out of the deal." (Collins Dep. pp. 19-20, 29; Dishman Dep. pp. 52-53; HT pp. 54-58).

(K) At least three drafts of the settlement agreement containing ¶ 4 were prepared and circulated internally by Sawicki after the Mediation. (HT pp. 59; 110; 135; ST Ex. 3A-3C).

(L) On March 18, Collins and Saad prepared a letter to IGT informing IGT that there had been a settlement agreement and that, pursuant to ¶ 8 of the MOU, IGT was to have no communication with SouthTrust. (Joint Ex. L). The parties agree (and even if there were not such an agreement, the court would find) that ¶ 8 was never discussed during the private session, yet Collins viewed that portion of the MOU as part of the parties' settlement.

(M) Even after concern was expressed over ¶ 4, Defendants continued to enforce other provisions of the MOU, including ¶ 8.[5]

(N) Prior to March 25, 2004, no representative of Defendants ever communicated to the court that there was any problem with the MOU and therefore, the court dismissed this case on March 17 based upon the telephone call from counsel regarding the settlement. Defendants did not advise the court or counsel for SouthTrust that there was a dispute regarding ¶ 4 until approximately 5 p.m. on March 25, the day before the settlement documents were due to court or, absent such a filing, the case would be dismissed with prejudice. (HT p. 132).

2. The court finds, based upon the entirely of the testimony and evidence submitted in this case, that: (1) throughout the Mediation, SouthTrust insisted on the early payment term now contained in ¶ 4 of the MOU; (2) the parties reached a consensus on the term and it was agreed

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[5] But for the parties' agreement on and existence of ¶ 4, there would have not been a need for the second part of ¶ 8 to be part of the parties' settlement or the MOU. The first part of ¶ 8, prohibiting SouthTrust from selling, compromising, or conveying the debt or the IGT Judgment, protects the Defendants from a compromise of the Judgment by SouthTrust. The second part of ¶ 8, prohibiting SouthTrust from communicating with IGT about any aspect of the matter, mediation, or settlement, only guards against the potential that SouthTrust might learn about such an early payment by IGT, or encourage such an early payment, pursuant to ¶ 4. (HT pp. 117; 125-28).

to by Sawicki and Collins;[6] (3) during the drafting of the MOU, Sawicki asked about whether there was any discussion about ¶ 4 during the private session because he wanted to make certain that Collins and Dishman had not revisited or altered that already agreed-to term; (4) Sawicki was satisfied by SouthTrust's response that the private session negotiations did not modify or alter the parties' consensus on that term reached earlier in the Mediation; (5) Collins decided he wanted ¶ 4 off the table when, after the Mediation, he either suspected or discovered that there was a possibility of early payment by IGT; and (6) only then, after the Mediation, did Collins implement a plan to either call into question the validity of ¶ 4, or renegotiate it, because at that later time (*i.e.*, after learning that early payment of the Judgment was more likely than he earlier believed) it would have been to his financial advantage to do so.

3. Before and during the Mediation, Collins: (1) had told SouthTrust that if the IGT Judgment proceeds were available, he would pay all loan obligations in full; (2) did not believe that IGT would pay early; (3) wished to negotiate a discount on the loan

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[6] The court notes that, based upon certain portions of Welch's deposition *transcript*, the Defendants argue there was no agreement between the parties regarding ¶ 4. However, the deposition *videotape* reveals that, although he never polled the parties to determine if an *express* agreement existed as to the IGT early payment contingency, he did believe that the term was agreed to by consensus. (Welch Dep. at 41-42). The mediator emphasized that the "didn't see [the contingency of early IGT payment] as a super important issue that I faced as an arbitrator. I thought there was a consensus on that." (Welch Dep. at 42.) Because he thought the term was not in dispute, because SouthTrust indicated it had to be part of the agreement, and because Defendants never indicated they would not agree to the term, the mediator listed the IGT early payment contingency in the "not contentious" column. (Welch Dep. at 41-42). The court finds that the mediator's view that there was a consensus on the subject matter of ¶ 4 supports SouthTrust's arguments in this case and is itself supported by the fact that the parties included that term in the MOU.

in order to limit the amount of personal funds he would have to pay to satisfy Defendants' indebtedness to SouthTrust; and (4) did not reject the early payment contingency (later memorialized as ¶ 4) because, at that time, he did not believe there was any likelihood that IGT would voluntarily pay the Judgment and, further, was most concerned with limiting the amount of personal funds that he would contribute to pay off the indebtedness, and the IGT contingency helped him accomplished that goal.

4. In concluding that the parties agreed to settle the case, and specifically that Defendants agreed to ¶ 4 as a component of that settlement, the court specifically rejects any testimony to the contrary provided by Saad, Collins, and/or Sawicki because the court finds such testimony is not to be credited. The court so finds because the actions of Saad, Collins, and Sawicki were inconsistent with their testimony, and on many occasions, their testimony was internally inconsistent. In addition, at the hearing, Collins acted as an advocate, not a witness. He was

short on details and rationale explanation, and long on hyperbole.[7]

5. Pursuant to ¶ 4, given the fact that IGT paid the Judgment prior to June 1, 2004, the contingency upon which ¶ 4 is based is no longer contingent, and SouthTrust is entitled to "all outstanding principal, interest, costs, and fees due under the Loan Documents, less any payments made by or on behalf of CHC pursuant to this settlement."

Alternatively, Even If the Parties Did Not Enter into an Actual Agreement That Included ¶ 4, Sawicki Possessed Apparent Authority to Enter into the MOU and ¶ 4.

6. Alabama choice of law principles dictate that the "law of the state wherein a contract was executed governs questions regarding the validity and interpretation of the contract." *American Nonwovens, Inc. v. Non Wovens*

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[7] Essentially, Collins' position is that he was "horse trading" to discount the Loans, which had been in default for a substantial period of time, by telling SouthTrust that he could not, in the foreseeable future, receive payment on the sizeable Judgment his company had obtained against IGT. At the same time, he contends that he had no interest or incentive to try to collect the IGT Judgment until SouthTrust substantially discounted the Loans. He also asserts that his goal was to not do anything to interrupt the continuing accrual of 14% interest on the Judgment until he successfully discounted his loan with SouthTrust. To be very clear, and as already noted, the court rejects Collins' position that he did not agree to the terms of ¶ 4 at the Mediation. But, in any event, if Collins' plan was as he contends, it is a legal irony that his questionable business practices and ethics are such that they would lead to the result the court reaches today and perhaps worse for him. For example, if Collins knew or believed before the mediation that the IGT Judgment could be paid, but said differently during the Mediation, SouthTrust may well have claims against him and his companies for misrepresentation and/or material suppression. The court need not answer those questions today, however, because it finds Collins agreed to the terms of ¶ 4 and, in any event, that Sawicki had at least apparent authority to agree to the same.

Eng'g, 648 So.2d 565, 567 (Ala. 1994). In Alabama, there are two choice of law rules governing contracts: (1) those cases involving the validity or formation of the contract; and (2) those cases in which the parties are litigating performance under a contract. *See Jones v. Jones*, 18 Ala. 248, 250 (1850); *Macey v. Crum*, 30 So.2d 666, 669 (Ala. 1947). Where a dispute is based on the existence or validity of a contract, "[i]t is a principle of law, admitted by all courts, that the *lex loci contractus* [the law of the place where the contract was made] must govern as to the validity, interpretation, and construction of the contract." *Jones*, 18 Ala. at 250.[8]

7. In this case, because the parties dispute the validity or existence of a particular agreement, the crux of this case hinges on the validity of the MOU. Here, it is undisputed that the MOU was executed in Atlanta, Georgia. Accordingly, in determining the validity or formation of the MOU, this court finds that the law of the State of Georgia is applicable.

8. Under Georgia law, an attorney can bind his client to a settlement agreement by either apparent or actual authority. Under Georgia law, an attorney of record has apparent authority to bind his client unless his lack of authority is expressly communicated to the opposing party. *Pembroke State Bank v. Warnell*, 471 S.E.2d 187, 189 (Ga. 1996). As noted by the Georgia Supreme Court: "An attorney of record has apparent authority to enter into an agreement on behalf of his client and the agreement is enforceable against the client by other settling parties....The authority may be considered plenary unless it is limited by the client and that limitation is communicated to opposing parties." *Brumbelow v. Northern Propane Gas Co.*, 308 S.E.2d 544 (Ga. 1983).

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[8] As opposed to the traditional *lex fori* rule, or law of the forum, which applies to cases in which the existence or validity of the contract is admitted but the performance under the contract or the remedy for breach is at issue. *Macey*, 30 So.2d at 669.

Accordingly, implied or unspoken restrictions on an attorney's authority to settle a case are not sufficient. *Id.* "The client's remedy, *where there have been restrictions not communicated to the opposing party,* is against the attorney who overstepped the bounds of his agency, not against the third party." *Brumbelow, 308* S.E.2d at 675 (emphasis added).

9. The court finds that, based upon the facts outlined below, Sawicki had apparent authority to enter into the MOU, including ¶ 4:

(A) Sawicki is the attorney of record for the Defendants. The employment agreement between the Defendants and Alston & Bird provides that the law firm was engaged to serve as counsel to the Defendants in the Alabama case and in connection with other claims or disputes arising out of the Loan Documents. (Testimony of Sawicki, HT p. 112; Joint Ex. O).

(B) Dishman testified at trial that based on everything that he saw and heard at the Mediation, he understood that Sawicki had authority to settle the case on behalf of Defendants and to bind Defendants by signing the MOU. (HT p. 75).

(C) Sawicki admitted that no limitation on his authority to settle this action was ever communicated to SouthTrust or the mediator at the Mediation. (HT pp. 112-14; Welch Dep. at 76).

(D) Sawicki's authority to settle was never discussed in any manner until after the Mediation and after the issue with ¶ 4 came to light. (HT p.113, Collins Depo. pp. 60; 73; 76-77).

(E) The mediator characterized the Mediation as a "lawyers' mediation" and believed it was reasonable for SouthTrust to assume that Sawicki had the authority to settle the case even after Collins left the Mediation. (Welch Depo. p. 33, 85).

(F) When Collins left the Mediation, he expressly left "the details to the lawyers to handle." After Collins made this pronouncement, Sawicki negotiated, assisted in the drafting of, edited, and signed the MOU on behalf of the Defendants.

IV. COSTS

The evidence presented by SouthTrust prior to the hearing in this matter showed the outstanding amounts due and owing under the Loan Documents to be as follows: Principal $1,092,913.45; Interest $13,740.96; and Fees/Costs $108,308.42; for a total due and owing of

$1,214,962.83. The amount of fees/costs as of October 21, 2004, had grown to $157,435.89. There is no dispute about the amount of principal and interest owed.

However, Defendants object to certain of the fees/costs sought by SouthTrust – in the amount of approximately $55,005.20 – on the grounds that such costs were not "reasonable and necessary expenses incurred" by SouthTrust "in connection with" the subject Loans. (Doc. # 50, at 1). Specifically, Defendants object to the following: (1) $4,680.50 in fees owed to Burr & Forman relating to the Collins' Montana loan transactions; (2) $4,704.22 in fees owed to Bradley Arant relating to the Montana loan transactions; (3) $20,840.60 in fees paid to the Nelson Mullins law firm relating to a declaratory judgment filed in the United States District Court for South Carolina concerning the priority of SouthTrust's security interest in the contingency fee portion of that judgment claimed by CHC's counsel in the IGT litigation; and (4) $25,950.00 in fees paid to Arthur Anderson relating to an analysis conducted by that firm, as part of a workout of the subject loans, as to whether it was advisable for SouthTrust to make an additional loan to CHC to buy legal pinball machines to replace the gambling machines of CHC ruled to be illegal in South Carolina. (Doc. # 50, at 2-3).

SouthTrust has conceded that the amounts of $4,680.50 and $4,704.22 are to be excluded from the amount of fees sought. The court concludes, with respect to the remaining two items in dispute, that the $20,840.60 payable to Nelson Mullins was not a reasonable and necessary expense incurred by SouthTrust in connection with the subject loans. The court finds, based upon the evidence and arguments submitted by the parties, that SouthTrust should have conceded the priority issue before a declaratory judgment action was filed. Further, CHC was not a party

to that action and did not instigate or contribute to the litigation. Rather, that lawsuit was solely related to a dispute between CHC's counsel and SouthTrust and regarding their respective priority claims in the amount to be paid in contingency fees to CHC's counsel (as opposed to the amount of the judgment that would be realized by CHC).

The $25,950.00 paid to Arthur Andersen is another matter. The court finds that payment was a necessary and reasonable cost incurred in connection with the subject Loans, and SouthTrust is entitled to recover that cost. As their counsel conceded in a phone conference with the court, Defendants were actively considering whether to retool their businesses and replace their gambling machines with pinball machines. Accordingly, as part of SouthTrust's effort to work with CHC (which was in default) the expenditure at issue was reasonable.

Based upon the court's ruling and SouthTrust's concessions, the fees and costs to be awarded here total $127,210.57. The court has included this figure in the total amount of $1,241,348.89 (not including interest) to be paid to SouthTrust.

V. CONCLUSION

The court finds that Defendants' Motion for Enforcement of Settlement Agreement (Doc. #26) and Defendants' Amended Motion for Enforcement of Settlement Agreement (Doc. # 41) are due to be denied. Plaintiffs Motion for Order to Enforce Settlement Agreement (Doc. #25) is due to be granted. Plaintiffs Motion for Order to Find That No Settlement Agreement Exists Between the Parties (Doc. #35) is moot. A separate final order will be entered.

DONE and **ORDERED** this 22nd day of October, 2004.

/s/ R. David Proctor
R. DAVID PROCTOR
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-15957-GG

[Filed with the U.S. Court of Appeals, Eleventh Circuit July 14, 2005 Thomas K. Kahn, Clerk]

SOUTHTRUST BANK, an Alabama Banking Corporation,

Plaintiff-Appellee
Cross-Appellant,

versus

COLLINS HOLDING CORPORATION, f.k.a Collins Music Co. Inc., et al.,

Defendants-Appellants
Cross-Appellees.

On Appeal from the United States District Court
for the Northern District of Alabama

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before: BIRCH, DUBINA and BARKETT, Circuit Judges
PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Joel F. Dubina
UNITED STATES CIRCUIT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Case No.: CV-04-P-0354-S

SOUTHTRUST BANK, an Alabama
banking corporation,

Plaintiff,

v.

COLLINS HOLDING CORPORATION,
f/k/a Collins Music Co., Inc.,
a/k/a Collins Music Company, Inc., et al.,

Defendants.

MEMORANDUM OF UNDERSTANDING

The parties in the above-named action have reached an agreement, pursuant to which the parties set forth terms below from which appropriate documents, including a Consent Judgment and Forbearance Agreement, will be prepared and executed as soon as possible.

1. $2 Million payable by or on behalf of CHC to SouthTrust Bartk upon signing of settlement/forbearance agreement to be executed by the parties on or before March 31, 2004.

2. $7 Million payable by or on behalf of CHC to SouthTrust Bank on or before June 1, 2004.

3. $4 Million payable by or on behalf of CHC to SouthTrust Bank on or before March 31, 2005, and provided that monthly interest payments, calculated at the Prime Rate beginning to accrue on the date the $7 Million payment is made, shall be paid to SouthTrust.

4. If IGT complies with the Nevada order or otherwise pays the IGT judgment before June 1, 2004, SouthTrust shall receive all outstanding principal, interest, and fees due under the Loan Documents, less any payments made by or on behalf of CHC pursuant to this settlement.

5. Upon signing of the Forbearance Agreement, Defendants will sign the Consent Judgment for all outstanding principal, interest, and fees due under the loan documents. As long as CHC timely makes the payments detailed in Paragraphs 1-3 above, SouthTrust shall forbear from any enforcement of the Consent Judgment.

6. Upon any default under the Forbearance Agreement, the Consent Judgment will be subject to SouthTrust's immediate enforcement.

7. Upon the payment of the $4 Million final portion pursuant to the Forbearance Agreement, all outstanding loans, notes and other documents representing the

indebtedness from any of the Defendants to SouthTrust Bank (the "Debt") made the subject of this action will be transferred to Fred Collins or to the person or entity directed by CHC.

8. Upon executing this Memorandum of Understanding and as an affirmative covenant in the Forbearance Agreement, SouthTrust agrees not to attempt to sell, compromise, or convey the Debt or the IGT judgment, or to communicate with IGT about any aspect of this matter, mediation and/or settlement, except to convey to counsel for IGT that the dispute between SouthTrust and Defendants has been settled.

9. The parties agree to and will split the costs of the mediator, William Welch.

Executed on this 16th day of March, 2004.

/s/ Carol H. Stewart
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